STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

DOLORES MASIAK,

Plaintiff,

vs. Case No. 2005-5017-NO

RENAE'S CREATIVE GROOMING, INC.,

Defendant.

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OPINION AND ORDER

Defendant has filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

Plaintiff filed this complaint on December 14, 2005. In her complaint, plaintiff alleges that she was a business invitee on defendant's premises on April 1, 2005. Plaintiff avers that she attempted to avoid a ladder positioned in an aisle way on defendant's premises, and slipped and fell on the wet floor as a result. As a result of her fall, plaintiff claims that she suffered a displaced fracture of the right radius and ulna, which required an open reduction and internal fixation. She has therefore commenced the present action sounding in premises liability.

Defendant brings this motion for summary disposition under MCR 2.116(C)(8) and (C)(10). Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party "has failed to state a claim on which relief can be granted." *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993). All factual allegations are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *Id.* The motion should be granted only when the claim is so clearly unenforceable as a matter of law that no

factual development could possibly justify a right of recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Cork v Applebee's Inc*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000).

A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual support for the plaintiff's claim. *Arias v Talon Development*, 239 Mich App 265, 266; 608 NW2d 484 (2000). In evaluating a motion brought under this subrule, the Court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Spencer v Citizens Ins Co*, 239 Mich App 291, 299; 608 NW2d 113 (2000). When the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

In support of its motion for summary disposition, defendant argues that plaintiff's deposition testimony establishes that the alleged hazardous conditions she encountered were open and obvious and did not present any special aspects. As such, defendant avers that no genuine issue of material fact precludes summary disposition of this matter.

In response, plaintiff contends that there is a question of fact as to whether the hazardous conditions in defendant's hallway were open and obvious. Alternatively, plaintiff argues that the hazardous conditions presented special aspects insofar as they constituted violations of applicable building and safety ordinances.

The Court shall first address defendant's request for summary disposition under MCR 2.116(C)(10). Premises possessors are not absolute insurers of the safety of their invitees, *O'Donnell v Garasic*, 259 Mich App 569, 573-574; 676 NW2d 213 (2003). They are not required to protect their invitees from "open and obvious" dangers that an average user of ordinary intelligence would have been able to discover upon casual inspection. *Novotney v*

Burger King (On Remand), 198 Mich App 470, 475; 499 NW2d 379 (1993). Nevertheless, a plaintiff may recover if an open and obvious condition has special aspects that give rise to a uniquely high likelihood of harm or severity of harm. See, e.g. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 519; 629 NW2d 384 (2001). As such, recovery may be possible where an open and obvious condition is either effectively unavoidable, or creates a high risk of death or serious bodily injury. *Id.* at 518.

Having carefully reviewed plaintiff's deposition testimony and the other evidence presented by the parties, the Court is satisfied that the alleged hazardous conditions were open and obvious as a matter of law. During her deposition, plaintiff testified that she walked up to the rear entrance of defendant's premises with her dog. Plaintiff's Deposition at 29. She testified that she knocked on the door and was told to "come on in." *Id.* at 31. She maintains that she was walking through a narrow hallway when her "foot hit a ladder or stool or something and [she] slipped." *Id.* at 31-32. Plaintiff testified that she was looking straight ahead, at "eye level," and did not look down as she walked through the hallway. *Id.* at 37. She acknowledged that the lighting was adequate in the hallway, and she admitted that she would have been able to see the stool or ladder had she looked down. *Id.* at 44. Plaintiff speculated that she might have slipped on water as well, since she noticed water on the floor following her fall. *Id.* at 47. However, plaintiff testified that the stool or ladder, rather than the water, initially caused her to trip. *Id.* at 40. She candidly acknowledged that she did not know if she "slipped on the water besides." *Id.*

Under these circumstances, the Court is satisfied that there is no genuine issue of material fact as to whether plaintiff would have seen the stool or ladder had she been looking. Therefore,

from the objective standpoint of the average invitee, the hazard posed by the stool or ladder was open and obvious.

Likewise, there is no genuine issue of material fact as to whether the alleged water in the hallway constituted a hidden danger which contributed to plaintiff's fall. Since plaintiff was looking ahead at eye level and did not notice the stool or ladder, she could not possibly have noticed any water on the floor prior to her fall. Thus, whether the water was open and obvious is a matter of speculation and conjecture.[1] Furthermore, plaintiff is unable to say whether the water actually contributed to her fall. Since mere speculation and conjecture are insufficient to create an issue of material fact, *Ghaffari v Turner Construction Co*, 268 Mich App 460, 465; 708 NW2d 448 (2005), plaintiff's observation of some water on the floor following her fall is irrelevant to the disposition of this matter.

The Court must nevertheless determine whether any special aspects rendered the open and obvious conditions unusually dangerous. As noted above, plaintiff suggests that the condition of the area in which she fell violated applicable building ordinances, and that these violations constitute a basis for imposing liability on defendant. Specifically, plaintiff claims that the hallway in which she fell was too narrow, that the stool or ladder obstructed the doorway, and that the stool or ladder posed a "slip and trip" hazard.

It is well established that the open and obvious doctrine cannot be used to avoid a specific statutory duty. *Woodbury v Bruckner*, 467 Mich 922; 658 NW2d 482 (2002). Even a violation of a building code may be some evidence of negligence. *O'Donnell*, *supra* at 578 (citation omitted). However, not all building code violations feature special aspects that will allow a plaintiff to avoid the open and obvious danger doctrine. *Id.* Rather, the Court must determine,

on a case-by-case basis, whether there is something unusual about the code violations because of their character, location, or surrounding conditions that gives rise to an unreasonable risk of harm. See *id.*

In the present case, there is no indication that the stool or ladder encountered by plaintiff was effectively unavoidable. To the contrary, plaintiff's own deposition testimony suggests that she would have been able to avoid tripping on the stool or ladder had she noticed it. On this point, plaintiff's deposition testimony contradicts the allegations contained in her complaint, wherein her attorney asserts that she slipped on water while attempting to avoid tripping on the ladder. However, even if the Court were to disregard the fact that the allegations contained in the complaint are directly contradicted by plaintiff's deposition testimony, the Court would still be satisfied that the conditions was not effectively unavoidable. The *Lugo* Court posits an example of an effectively unavoidable condition as a situation where the only exit to a commercial building is blocked by a pool of standing water. *Lugo*, *supra* at 518. Plaintiff does not dispute that there was a front entrance to defendant's premises which she could have used. Since plaintiff could have avoided the alleged hazardous conditions by using the front entrance, the conditions she encountered were not effectively unavoidable.

The Court also finds that the danger posed by tripping on a stool or ladder left in a hallway does not give rise to a high risk of death or severe bodily harm. Because the risk presented by the stool or ladder and the narrowness of the hallway were not unreasonably dangerous, whether these conditions violated applicable building ordinances is inapposite. Even if plaintiff could establish that the condition of defendant's premises violated local ordinances, defendant's non-compliance would not expose it to liability for plaintiff's injuries. As no special

[1] However, plaintiff's deposition testimony certainly suggests that the water would have been visible, since she

aspects rendered the open and obvious conditions encountered by plaintiff unreasonably dangerous, summary disposition pursuant to MCR 2.116(C)(10) is warranted.

Having determined that summary disposition is warranted pursuant to MCR 2.116(C)(10), it is unnecessary for the Court to address defendant's request for summary disposition under MCR 2.116(C)(8).

For the reasons set forth above, defendant's motion for summary disposition is GRANTED and plaintiff's complaint is DISMISSED. Pursuant to MCR 2.602(A)(3), this Opinion and Order resolves the last pending claim and closes this case.

IT IS SO ORDERED.

Dated: August 28, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Paul F. Doherty
Edward A. Batchelor III

DONALD G. MILLER
CIRCUIT JUDGE

AUG 28 2006

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CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk

acknowledges that the hallway was adequately illuminated.